Filed 2/15/11 In re Audrey A. CA2/7

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re AUDREY A. et al., Persons Coming Under the Juvenile Court Law.	B224937 (Los Angeles County Super. Ct. No. CK78831)
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Respondent, v. DEBORAH T. et al., Defendants and Appellants.	

APPEALS from orders of the Superior Court of the County of Los Angeles, Randolph M. Hammock, Referee. Affirmed.

Merrill Lee Toole, under appointment by the Court of Appeal, for Defendant and Appellant Deborah T.

Roni Keller, under appointment by the Court of Appeal, for Appellants Audrey A. and Daniel A.

Andrea Sheridan Ordin, County Counsel, James M. Owens, Assistant County Counsel, Jeanette Cauble, Senior Deputy County Counsel, for Plaintiff and Respondent the Los Angeles County Department of Children and Family Services.

On May 10, 2010 the juvenile court, pursuant to Welfare and Institutions Code section 362.4,[1] granted joint legal custody of Audrey A. (born July 2000) and Daniel A. (born November 2004) to their mother, Deborah T., and their father, Armando A., full physical custody of both children to Armando with visitation for Deborah and terminated its jurisdiction. Deborah and both children appeal from the court's orders, contending Deborah should have received joint physical custody of Audrey and Daniel. Deborah also argues the court erred in terminating its jurisdiction before she had the opportunity to complete six months of court-ordered services. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Dependency Petition and Detention Hearing*

On September 4, 2009 the Los Angeles County Department of Children and Family Services (Department) filed a section 300 petition alleging Deborah had a history of abusing alcohol and methamphetamine; she had physically abused her oldest child, Marissa (born June 1994),[2] by initiating a combative altercation; Marissa had been sexually abused in December 2008 and January 2009 by Deborah's then live-in boyfriend, Mark Espinoza; and Deborah knew or should have known of the abuse and allowed Espinoza unlimited access to Audrey and Daniel, thereby placing them at risk of sexual abuse. The petition also alleged that Deborah and Armando had a history of domestic violence and Armando had a history of substance abuse. At the time the

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1 Statutory references are to the Welfare & Institutions Code.

2 Armando is not Marissa's genetic father. Marissa is not the subject of, or a party to, this appeal.

petition was filed, Audrey and Daniel resided with Armando and visited with Deborah regularly. Marissa lived with Deborah full time.[3]

On September 4, 2009, finding a prima facie case that Audrey, Daniel and Marissa were children described by section 300, the juvenile court, in accordance with the Department's recommendation, ordered Marissa detained in shelter care and Audrey and Daniel released to Armando's custody. (§ 319, subd. (b).) In addition, the court ordered individual and conjoint counseling for Deborah and Marissa and allowed Deborah monitored visitation with Marissa, Audrey and Daniel.

2. *The Jurisdiction and Disposition Hearings*

On December 10, 2009, following an evidentiary hearing, the court struck the allegations of domestic violence and Armando's substance abuse (the only allegations involving Armando) for insufficient evidence and sustained (with some interlineated amendments) the remaining substantive allegations.

At the disposition hearing on January 13, 2010, the court declared Marissa, Audrey and Daniel dependent children of the court. Marissa was ordered suitably placed; Audrey and Daniel remained released to Armando. The court ordered family maintenance services for Armando and family reunification services for Deborah in connection with Marissa's removal from her custody. The court also ordered monitored visitation for Deborah with each of her three children with discretion given to the Department to liberalize her visitation. In addition, Deborah was ordered to submit to drug testing.

Following the court's announcement of its disposition order, Armando requested the court terminate its jurisdiction with orders giving him full custody of Audrey and Daniel. The court declined, explaining it believed (along with children's counsel) that it was in the children's best interests to give Deborah "some services" and "not terminate

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3 Armando and Deborah were involved in a family law custody dispute over Audrey and Daniel when the dependency petition was filed. According to the allegations in the petition and the undisputed evidence, Audrey and Daniel were living with Armando in September 2009.

jurisdiction today."[4] The court also stated, however, that it did not envision prolonging its jurisdiction for more than six months. The court set a progress report hearing for March 15, 2010 to review Deborah's visitation and compliance with her counseling program and set a section 364 review hearing for Audrey and Daniel and a section 366.21, subdivision (e), hearing for Marissa, for July 7, 2010.

3. *The March 15th Progress Report Hearing*

On March 15, 2010 the Department reported it had exercised its discretion to liberalize Deborah's visitation to unmonitored as of March 8, 2010 following Deborah's evaluation by a clinical psychologist who determined Deborah was mentally and emotionally stable, willing to address the traumas in her life and not suffering from depression. The Department reported the children were doing well residing with their father and visiting regularly with their mother. The court indicated its intent (without objection by Armando or Deborah) to terminate its jurisdiction, but before doing so, wanted the family to participate in a mediation to create a workable and mutually agreeable custody and visitation plan to include in the section 362.4 order terminating its jurisdiction. The court set the mediation for April 6, 2010 and indicated it would resolve the custody and visitation issues itself at a contested hearing if the family was unable to reach agreement. The court also set a progress report hearing for April 14, 2010.

4. *The April 14, 2010 Progress Report Hearing*

On April 14, 2010 Deborah and Armando, through their respective counsel, reported that they had been unable to reach agreement on the custody of Audrey and Daniel at the mediation. The court set the matter for a contested section 364 hearing on April 28, 2010, at which time, it announced, it would decide custody and terminate its

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[4] The court did not identify the "services" to which it was referring, although the court-ordered disposition case plan and January 13, 2010 minute order identify individual counseling and a possible substance abuse treatment program for Deborah if any one of 10 court-ordered drug tests was missed by Deborah or yielded a positive result.

jurisdiction over Audrey and Daniel. Deborah did not object to, or file a timely appeal from, this order.[5]

5. *The April 28, 2010 Progress Report Hearing*

On April 28, 2010 Deborah requested the court award her joint legal and physical custody, a request supported by Audrey and Daniel's counsel, who argued joint custody would be in the children's best interests. Armando sought full physical custody of his children. Following an evidentiary hearing, the court awarded joint legal custody of Daniel and Audrey to Armando and Deborah and physical custody of Audrey and Daniel to Armando, with one midweek, alternate weekends and overnight unmonitored visits for Deborah, finding that arrangement, much like the custody and visitation plan that was in place and which had occurred prior to the filing of the dependency petition, was in the children's best interests. The court terminated its jurisdiction, then stayed the termination pending receipt of the family law order. The family law order was received on May, 10, 2010. The court's order terminating its jurisdiction was entered the same date.

DISCUSSION

1. *Deborah Has Forfeited Her Challenge to the Juvenile Court's Order Terminating Her Social Services*

Deborah contends the court ordered "reunification services" for her as a noncustodial parent of Daniel and Audrey under section 361.2, subdivision (b)(3), then erroneously, and prematurely, terminated those services in April 2010, before she had received her full "entitlement" to "six months" of services. Deborah did not challenge in the juvenile court the decision to terminate services or jurisdiction. Accordingly, any

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5 Although Deborah's notice of appeal identifies the April 14, 2010 order, as well as subsequent orders, as the "orders appealed from," the notice of appeal, filed on June 22, 2010, was not timely as to the April 14, 2010 order. (See Cal. Rules of Court, rule 8.406; *In re Melvin A.* (2000) 82 Cal.App.4th 1243, 1252 [postdispositional orders, except those setting a § 366.26 hearing, are directly appealable].) Accordingly, to the extent Deborah challenges this order, we are without jurisdiction to consider it. (See *Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 662 [appellate court lacks jurisdiction to review untimely appeal]; *In re Marriage of Lloyd* (1997) 55 Cal.App.4th 216, 219 [same].)

argument to that effect has been forfeited. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293 [forfeiture doctrine applicable in dependency proceedings]; *In re Wilford J.* (2005) 131 Cal.App.4th 742, 754 ["purpose of forfeiture rule is to encourage parties to bring errors to the attention of the juvenile court so that they may be corrected"].)[6]

2. *The Court's Custody Order Was Well Within Its Discretion*

Section 362.4 authorizes the juvenile court, when terminating its jurisdiction over a child who has been declared a dependent child of the court, to issue a custody and visitation order (an "exit order")[7] that will become part of the relevant family law file and remain in effect in the family law action "until modified or terminated by a subsequent order." When making a custody determination under section 362.4, "the court's focus and primary consideration must always be the best interests of the child." (*In re Nicholas H.* (2003) 112 Cal.App.4th 251, 268; accord, *In re Chantal S.* (1996) 13 Cal.4th 196, 206.) This determination is made without reference to any preferences or presumptions ordinarily applicable in the family court. (See *In re John W.* (1996)

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6 Deborah's argument on the merits is also fundamentally flawed. Deborah insists the court ordered reunification services for her under section 361.2, which applies when a child is removed from a custodial parent and placed with a noncustodial parent. The court did no such thing; indeed, section 361.2 is simply inapplicable in this case because Audrey and Daniel were never removed from Armando, who was their custodial parent at the inception of the dependency proceedings. (Although no formal custody order from the family court was in place, it was undisputed the children had resided with Armando since July 2008, prior to the filing of the dependency petition.) Although Deborah received reunification services as to Marissa, who was removed from *her* custody, and also, it appears, received some further services as a person involved in Audrey and Daniel's lives, those services were not part of a reunification order under sections 361.2 or 361.5 nor were they statutorily required under either provision.

7 Although not used in the juvenile dependency statutes, the term "exit order" has become shorthand for custody orders issued pursuant to section 362.4. (See *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 301; see also *In re Chantal S.* (1996) 13 Cal.4th 196, 203 ["'[w]hen the juvenile court terminates its jurisdiction over a dependent child, section 362.4 authorizes it to make custody and visitation orders that will be transferred to an existing family court file and remain in effect until modified or terminated by the superior court'"].)

41 Cal.App.4th 961, 972 [ordinary "presumption of parental fitness 'that underlies custody law in the family court just does not apply to dependency cases'"].)

We review the juvenile court's decision to terminate dependency jurisdiction and to issue a custody order pursuant to section 362.4 for abuse of discretion (*In re Stephanie M.* (1994) 7 Cal.4th 295, 318) and may not disturb the order unless the court """exceeded the limits of legal discretion by making an arbitrary, capricious, or patently absurd determination.""" (*Ibid.*; accord, *Bridget A. v. Superior Court* (2007) 148 Cal.App.4th 285, 300.)

Deborah, joined by Audrey and Daniel, contends the court abused its discretion in failing to award her joint physical custody of Audrey and Daniel because the children made clear their desire to live with both of their parents and there was no evidence that living with Deborah posed any risk to the children. As we have explained, absence of risk is not the defining standard. (See *In re Nicholas H., supra*, 112 Cal.App.4th at p. 268 ["[a] finding that neither parent poses any danger to the child does not mean that both are equally entitled to half custody, since joint physical custody may not be in the child's best interests for a variety of reasons"]; *In re John W., supra*, 41 Cal.App.4th at pp. 973-974 [same].) Here, the court acknowledged neither Armando nor Deborah posed a risk to the children, but concluded, based on the custody arrangement preceding the initiation of dependency proceedings, as well as Deborah's behavior that led to the initiation of the proceedings and the undisputed well being of the children under the current custody-visitation arrangement, that it was in the children's best interests to remain in Armando's custody with Deborah receiving liberal visitation. While it certainly would have been within the court's discretion to enter an order granting joint physical custody, nothing in this record remotely suggests the court's custody and visitation order was arbitrary or irrational.

DISPOSITION

The juvenile court's orders are affirmed.

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.